

# INDEX

## PART I

	Page
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
QUESTIONS PRESENTED.....	3
STATEMENT.....	3

## PART II

### ARGUMENT

1. The Fourteenth Amendment does not prohibit a State from prescribing juror qualifications which require the exercise of judgment on the part of the board or officials charged with the responsibility of composing the jury list.....	12
(a) The illusory vagueness issue.....	14
(b) Capacity for wrongful administration.....	17
(c) Constitutionality of intelligence and character qualifications.....	18
2. The operation in Taliaferro County of Georgia's statutes pertaining to the selection of members of county boards of education is not violative of any right secured to Appellants by the Thirteenth, Fourteenth, or Fifteenth Amendments..	21
3. The Court should deny Appellants' request for an advisory opinion that a "freeholder" qualification for membership on a county school board is violative of the Fourteenth Amendment.....	24
CONCLUSION.....	27

## TABLE OF AUTHORITIES

Cases	Page
<i>Aetna Life Insurance Co. v. Haworth</i> , 300 U. S. 227 (1937).....	25
<i>Barr v. Matteo</i> , 355 U. S. 171 (1957).....	25
<i>Becraft v. Strobel</i> , 287 N. Y. S. 22 (1936).....	26
<i>Brown v. Allen</i> , 344 U. S. 443 (1943).....	16,19,21
<i>Duncan v. Louisiana</i> , 391 U. S. 145 (1968).....	19
<i>Eccles v. Peoples Bank of Lakewood Village, California</i> , 333 U. S. 426 (1948).....	25
<i>Joint Anti-Fascist Refugee Committee v. McGrath, Attorney General</i> , 341 U. S. 123 (1951).....	25
<i>Labat v. Bennett</i> , 365 F.2d 698 (5th Cir. 1966).....	18
<i>Moody v. Flowers</i> , 387 U. S. 97 (1967).....	1
<i>Screws v. United States</i> , 325 U. S. 91 (1945).....	15,17
<i>Snowden v. Hughes</i> , 321 U. S. 1 (1944).....	24
<i>State v. McAllister</i> , 28 W. Va. 485, 18 S. E. 770 (1893).....	26
<i>Strauder v. West Virginia</i> , 100 U. S. 303 (1880).....	19,21,26
<i>Sullivan v. State</i> , Ga. (No. 25147, decided May 8, 1969).....	16
<i>Swain v. Alabama</i> , 380 U. S. 202 (1965).....	21
<i>Teague v. Keith</i> , 214 Ga. 853, 108 S.E.2d 489 (1958).....	17
<i>Turner v. Goolsby</i> , 255 F.Supp. 724 (S. D. Ga. 1965) ..	4
<i>Vought v. Wisconsin</i> , 217 U. S. 590 (1910).....	26

## TABLE OF AUTHORITIES (Continued)

Page	Page
<b>Constitutional Provisions</b>	
U. S. Const. Art. III, § 1 . . . . .	17
U. S. Const. Art. III, § 2 . . . . .	25
U. S. Const. Amend. VI . . . . .	18,20
U. S. Const. Amend. VII . . . . .	18,20
U. S. Const. Amend. XIII . . . . .	21
U. S. Const. Amend. XIV . . . . .	12,13,14,15,18,19,21
U. S. Const. Amend. XV . . . . .	21
Georgia Const. (1945) Art. VIII, Sec. V, Par. I (Ga. Code Ann. § 2-6801) . . . . .	24
Georgia Const. (1945) Art. VIII, Sec. V, Par. II (Ga. Code Ann. § 2-6802) . . . . .	24
Georgia Const. (1945) Art. VIII, Sec. VI, Par. I (Ga. Code Ann. § 2-6901) . . . . .	2,23,24
Georgia Const. (1945) Art. VIII, Sec. VI, Par. II (Ga. Code Ann. § 2-6902) . . . . .	2,24
<b>Statutes</b>	
28 U. S. C. §§ 44, 134 . . . . .	17
28 U. S. C. § 1253 . . . . .	1
28 U. S. C. § 2284 . . . . .	5
82 Stat. 52 (28 U. S. C. A. § 1865) . . . . .	13,20
Ga. Code Ann. § 32-902 . . . . .	24
Ga. Code Ann. § 59-106 . . . . .	12,13,15,16,20,21

## TABLE OF AUTHORITIES (Continued)

	Page
<b>Miscellaneous</b>	
28 Am.Jur.2d <i>Estates</i> § 8 . . . . .	24
42 Am.Jur. <i>Public Officers</i> § 49 . . . . .	26
22A C. J. S. <i>Criminal Law</i> § 676 . . . . .	17
32 C. J. S. <i>Evidence</i> §§ 434, 436 . . . . .	17
82 C. J. S. <i>Statutes</i> § 68 . . . . .	15, 17
21A Words & Phrases, <i>Intelligent</i> p. 718-719 . . . . .	16
43 Words & Phrases, <i>Uprightness</i> p. 447 . . . . .	16
Black's Law Dictionary (4th Ed. 1951) . . . . .	24
Webster's Third New International Dictionary (3d Ed. 1961) . . . . .	15

IN THE  
**Supreme Court of the United States**

October Term, 1968

---

**No. 842**

---

CALVIN TURNER, et al,

*Appellants,*

v.

W. W. FOUCHE, et al,

*Appellees.*

---

**On Appeal from the United States District Court  
for the Southern District of Georgia,  
Augusta Division**

---

**BRIEF OF THE STATE OF GEORGIA (an Appellee)**

---

**JURISDICTION**

Appellants invoke this Court's jurisdiction to directly review a decision of a United States District Court under 28 U.S.C. § 1253. For the reasons set forth in its previously filed brief in support of its Motion to Dismiss it is the position of the State of Georgia, an Appellee, that jurisdiction is not properly invoked under 28 U.S.C. § 1253 and that under this Court's decision in *Moody v. Flowers*, 387 U.S. 97 (1967) Appellants should have

taken their appeal to the United States Court of Appeals for the Fifth Circuit.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

While the various constitutional and statutory provisions of the State of Georgia cited by Appellants are accurately set forth in the appendix to their brief, we think Article VIII, Section VI, Paragraphs I and II of the Constitution of the State of Georgia of 1945 (Ga. Code Ann. §§ 2-6901 and 2-6902) are also pertinent to adequate evaluation of their contentions. These State constitutional provisions provide:

Paragraph I — "There shall be a County School Superintendent, who shall be the executive officer of the County Board of Education. He shall be elected by the people and his term of office shall be for four years and run concurrently with other county officers. The qualifications and the salary of the County School Superintendent shall be fixed by law."

Paragraph II — "Notwithstanding provisions contained in Article VIII, Section VI, Paragraph I [§ 2-6901] of this Constitution, or in any local constitutional amendment applicable to any county school superintendent, the term of office of county school superintendents, their residence requirements and the method of their election or appointment may hereafter be changed by local or special laws conditioned upon approval by a majority of the qualified voters of the county school district voting in a referendum thereon. County school superintendents shall have such qualifications, powers, duties, and compensation as may be provided by law."

## QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment prohibits a State from prescribing juror qualifications which require the exercise of judgment on the part of the board or officials charged with the responsibility of composing the jury list?
2. Whether the operation in Taliaferro County of Georgia's statutes pertaining to the selection of members of county boards of education is violative of any right guaranteed to Appellants by the Thirteenth, Fourteenth or Fifteenth Amendments?
3. Whether this Court should render an advisory opinion that "freeholder" qualifications for membership on a county school board are violative of the Fourteenth Amendment?

## STATEMENT

According to the 1960 census, Taliaferro County, Georgia, had a population of 3,370 [A. 152] of which Appellants (plaintiffs below and hereinafter referred to as "Plaintiffs") alleged 2,092 to be Negro and 1,273 of the white race [A. 14].<sup>1</sup> Plaintiffs introduced evidence indicating that the voting age population of the county in 1966 was 1,073 Negroes and 917 whites, and that for each race actual voter registration exceeded 100%, with 1,163 Negro and 1,052 white voters included on the rolls [A. 153, 300].<sup>2</sup>

<sup>1</sup>While not a part of the record, it may be of interest to the Court that the most recent population estimate of the Georgia Department of Public Health (dated April 25, 1969) indicates that the current population of Taliaferro County has decreased to 2,500 persons, 1,500 of whom are Negro and 1,000 of whom are white.

<sup>2</sup>An explanation of the 100% plus voting registration may be found in the fact of population decline and the fact that a substantial number of citizens

Notwithstanding the apparent absence of any racial barrier respecting voting rights in Taliaferro County, however, the racial consciousness, feelings and attitudes of the citizenry run deep. Racial turbulence in 1965 led to litigation between some of the same parties as are involved in the present case. As a result of the claims and counter-claims in that prior action, injunctions were issued against both sides, see *Turner v. Goolsby*, 255 F. Supp. 724 (S.D. Ga. 1965), and when the court required the county board of education to cease its operation of the county school system on a racially segregated basis, all white pupils withdrew rather than attend school with Negroes. Evidence introduced in the present case indicated that in 1967 some 72 of the county's former white pupils were attending a private school within the county with the remainder presumably attending school outside the county [A. 354-359].

As the three-judge district court below correctly noted, the present case is "quasi-sequential" to *Turner v. Goolsby* [A. 397]. Because of the abandonment of the public school system by all white pupils and white teachers, the result was one of an all-white school board administering an all-black public school system [A. 47, 120, 354-357]. It was this situation — the all-white composition of the 5-member school board — which produced the present case. Calvin Turner, one of the plaintiffs in the previous litigation, filed suit for himself, his minor daughter, and other similarly situated voters and school children of the county. The gist of the complaint was that Negroes were being excluded from membership on the school board and consequently deprived of

---

appear to maintain ties with and voting residence in the county even though they are away most of the time. See A. 300-302.

a voice in school management or affairs. It was alleged that this discrimination was being accomplished by the defendants (i.e. the individual county jury commissioners, grand jurors and members of the county school board) through wrongful county-level administration of State laws pertaining to the appointment of county boards of education. The relationship of the three groups of defendants lies in the fact that under the State constitutional provision and statutory enactments cited by Plaintiffs, the members of the Taliaferro County Board of Education are appointed by the county grand jury which is in turn selected by the county's jury commissioners. The same State school laws, which are more fully discussed in the argument portion of this brief, provide that the county school superintendent (who is also white) shall be elected by the voters of the county. Plaintiffs make no contentions respecting this office.

In addition to their attack upon the allegedly improper county-level administration of State law by the defendant county officials, Plaintiffs, in order to invoke the jurisdiction of a three-judge district court, also inserted allegations that the State constitutional provision and statutory enactments referred to were facially unconstitutional, Plaintiffs underlying and somewhat novel theory being that the facial unconstitutionality resulted from the fact that they *were capable* of being wrongfully administered by local officials [A. 100; Appellants' Brief p. 25]. Although it later found that there was no merit in these three-judge court questions [A. 403], a three-judge court was initially convened to hear the case [A. 18]. The State of Georgia was notified of the attack upon its laws pursuant to 28 U.S.C. § 2284 (a) and promptly moved to intervene as a party defendant

for the limited purpose of asserting the *facial* validity of its enactments [A. 64]. The motion was granted [A. 65].

When the case came on for an initial hearing on January 23, 1968, the State neither introduced evidence nor took part in argument respecting the propriety or impropriety of the administration of its statutes in Taliaferro County by the defendant county officials, this being left to able counsel for the principal parties. The State did urge that if racially discriminatory administration of the State statutes did exist in Taliaferro County, it was not only unauthorized by the statutes, but was indeed in violation of the same, such statutes in and of themselves being both non-discriminatory and constitutional.

Evidence introduced by the parties during the two hearings in the case conflicted on various points. While Plaintiff Turner testified that he could never present his complaints to the school board because he could not find out when it met [A. 187-188], and while it is argued at page 12 of Appellants' Brief that the Board of Education changed the time of its meetings without public notice as required by law, evidence introduced on behalf of the defendant school board members showed that board meetings were held on a regular monthly schedule and that the time and day fixed for such meetings was duly published in the county newspaper except for one instance when publication was late due to the publicly admitted error of the newspaper editor who misplaced a copy of a notice of change in the meeting time which had been received for publication [A. 50, 364-365]. Similarly, the charge that the county board of education was hostile to the needs and desires of the black students

[Appellants' Brief, p. 12; A. 214-217] was met by evidence that expenditure of funds per pupil had increased from \$322.76 to \$434.82 during the period following the withdrawal of all white pupils from the school system [A. 121-122].

It did appear at the initial hearing, on the other hand, that the traverse jury list was composed of 272 Whites and only 56 Negroes, and that the grand jury list was composed of 119 Whites and only 11 Negroes [A. 182-183, 399]. Towards the end of that hearing the District Court indicated that in light of the overall racial composition of the county, it believed that the low percentage of Negro jurors did make out, insofar as the county jury lists were concerned, a prima facie case of systematic racial exclusion [A. 251]. Counsel for the defendant county officials was advised to counsel his clients as to the legal requirements respecting jury selection in the hope that this problem could be cleared up by the time of the next hearing in the case. The court further indicated that although it had doubts as to what it could do about the fact that there were no Negroes on the county board of education, it would be "an act of statesmanship on the part of somebody who is able to get things done" if Negro representation on the school board could be achieved [A. 252-253]. The court went on to observe that the more desirable procedure would be for the citizens of Taliaferro County to solve problems of this nature by themselves, through reconstitution of the county jury lists and granting some relief to the Negro Plaintiffs about the schools [A. 253]. In the words of the court:

"You have got Negro citizens and White citizens and have been there a long time and have got to

live together some way another, so let's try to have a spirit of harmony and work some of these things out, and let's don't let the Courts have to solve everything because that's no solution in the end. The solution has to come out of the hearts of the people, the people that live in a place, so let's try to work that out." [A. 254].

The court's suggestion was heeded by defendants and upon the second hearing, on February 23, 1968, evidence was introduced to show: (1) that the State Superior Court Judge of the judicial circuit which includes Taliaferro County had on his own motion discharged the traverse and grand juries then serving and ordered a revision of both lists [A. 265-266, 272], (2) that the lists were accordingly reconstituted without regard to race by the Jury Commissioners — who secured the assistance of three responsible Negro citizens to aid in revision [A. 274-276, 281], and (3) that at its first meeting the county grand jury confirmed the school board's selection of a Negro citizen to fill one of two existing vacancies on the board [A. 268-269, 348-351]. Plaintiffs, although criticizing the choice of the Negro board member on various grounds, conceded that the new member was a respected citizen of the Negro community as far as moral character was concerned [A. 375].

The procedure used by the Jury Commissioners to reconstitute the jury lists was as follows: They commenced by examining the name of each individual on the county's list of 2,252 eligible voters [A. 87]. Being a small county the six commissioners were in a position collectively to know virtually everyone in the county [A. 249, 275] and as already indicated they had the assistance of three Negro advisors for additional infor-

mation respecting Negro citizens [A. 275]. From the list of all registered voters, the Commissioners proceeded to eliminate the following numbers of persons, without regard to race, for the following reasons:

Under 21 years of age.....	81
Dead .....	94
Persons who requested to be eliminated from consideration .....	43
Persons about whom information could not be obtained.....	226
Poor health and/or old age.....	482
Away from the county most of the time.....	533
Miscellaneous (not conforming to statutory qualifications of being intelligent and upright) .....	179
Elected officials and then known duplications .....	88
<hr/>	
TOTAL NUMBER ELIMINATED.....	1,646

With respect to the statutory qualifications (i.e. miscellaneous), the evidence indicated that the test of "intelligence" was the Jury Commissioners' estimation of whether the individual would be capable of understanding the proceedings in the court room and performing the duties of a juror [A. 283-285]. The test of "upright" was testified as being whether the individual had a good reputation in the community, with information from the Sheriff as to whether an individual had a criminal record being considered in this respect [A. 284-288].

Inasmuch as the 608 names remaining on the list after the above 1,646 persons were stricken were still far more than the number required, such 608 names were then arranged in alphabetical order with the Commissioners taking every other name for preparation of the traverse jury list [A. 267]. Race was not considered in the elimination of specific names from the list for the various reasons cited [A. 290], and it was not until the 304 alternately selected names were placed on the traverse jury list that the Commissioners examined the list to see how many were Negroes and how many were White [A. 267]. They determined that 113 were Negro and 191 were White [A. 267]. Deciding that the fairest way to select two-fifths of the traverse jury list required for placement on the grand jury list would be to draw names by lot, the Jury Commissioners proceeded to draw 121 names, which after being placed on the grand jury list were ascertained to consist of 44 Negroes and 77 white persons [A. 268]. The drawing of the actual grand jury from the names on the grand jury list by the Superior Court Judge was also by lot, and the Judge, not a resident of Taliaferro County, testified that he had no idea as to which selected names were Negro and which were white at the time he drew the same [A. 315]. The result was a grand jury composed of 23 persons, 17 of whom were white, and 6 Negro [A. 79].

While Plaintiffs remained dissatisfied, arguing that those Negroes who had assisted the Jury Commissioners and accepted county office (i.e. as a member of the county board of education) were insufficiently hostile to the county's white officials and hence were "Uncle Toms" [A. 278, 376], the District Court observed from the bench that the Jury Commissioners appeared to have

revised the jury lists in "a very fair way" [A. 392], and through procedures far better than the "key man" system used by many Federal courts [A. 302]. The court pointed out that from the voters list of approximately 50% White and 50% Negro voters, the final result was so close that "it wouldn't take but a switch of 40 people to make it a fifty-fifty jury list" [A. 394].

While permanently restraining and enjoining the Jury Commissioners and their successors in office from systematically excluding Negroes from the grand jury system in Taliaferro County [A. 406], the court also held that *as revised* the grand jury list was neither unconstitutional or illegal. In rejecting Plaintiffs' attacks upon the facial constitutionality of the State constitutional provision and statutes, the court declared:

"The court finds and concludes that the constitutional provision and the statutes in question are not unconstitutional on their face or as applied. There is nothing in the constitutional provision or in the statutes which contemplates or permits the resulting systematic exclusion from the grand juries. The standards are not inadequate. The facts showed systematic exclusion in the administration of the grand jury system prior to the revision but this resulted from the administration of the system and not from the constitutional provision and statutes under attack. . . . There is thus no merit in the three-judge District Court questions presented" [A. 403].

## PART II

### ARGUMENT

1. **The Fourteenth Amendment does not prohibit a State from prescribing juror qualifications which require the exercise of judgment on the part of the board or officials charged with the responsibility of composing the jury list.**

In its 1968 revision of the procedures used to select grand and traverse jurors in Georgia, the General Assembly put forth its best efforts to insure that county jury lists would fairly reflect a cross-section of the county's citizenry. To start with, it changed the name source for potential jurors from the long used books of the county tax receiver to the official registered voters' list. This, it was thought, would avoid exclusion of the poor. The General Assembly then specified not only that the jury list composed from this source should be a "fairly representative cross-section of the intelligent and upright citizens of the county," but that if it appeared to the jury commissioners that the jury list so composed was not a fairly representative cross-section they must:

"... supplement such list by going out into the county and personally acquainting themselves with other citizens of the county, including intelligent and upright citizens of any significantly identifiable group in the county which may not be fairly representative thereon." [Ga. Code Ann. § 59-106]

Notwithstanding this seemingly clear intent and attempt of the State to avoid exclusion of *any* significantly identifiable group from jury duty, however, Negro Plaintiffs, in instituting their action against local county jury

commissioners who failed to adhere to the State's mandate, declined to seek a remedy through enforcement of the statute in the State courts. Instead they attacked the statute itself on the ground that it was *facially* unconstitutional as well as wrongfully administered in Taliaferro County, Georgia.

The constitutional garb of Plaintiffs' somewhat novel attack upon the facial validity of Ga. Code Ann. § 59-106, as amended, is that it is *capable* of being wrongfully administered because it contains elements of vagueness. While the so-called "vagueness" contention will be considered shortly, we wish to declare at the very outset that it is the State's position this contention really presents an illusory issue which only tends to obfuscate the real question presented. Plaintiffs' "capacity" argument, if it has any merit at all, is equally applicable to any statute which calls for an exercise of judgment on the part of a public official or administrator. Thus the question which is really before this honorable Court is whether the Fourteenth Amendment prohibits a State from prescribing any juror qualifications or standards requiring an exercise of judgment on the part of the board, commissioners or officials charged with the responsibility of composing the jury list. This question is obviously of import beyond the borders of the State of Georgia.<sup>3</sup>

---

<sup>3</sup>If Plaintiffs' "capacity" argument is valid, it is difficult (in view of the inherent "vagueness" of the English language) to see how any existing statute pertaining to jury selection can survive. All would appear to be *capable* of being wrongfully administered. See, e.g. 82 Stat. 52, 28 U.S.C.A. § 1865 as well as the various State statutes referred to at pp. 12-13 of Plaintiffs' Jurisdictional Statement. The vagueness of the Federal statute is hereinafter discussed.

(a) *The illusory "vagueness" issue.*

It is the current fashion, whenever a disliked statute is attacked, to include an averment that it is "unconstitutionally vague." This is quite understandable. A plausible argument can invariably be made in support of vagueness contentions, and plaintiffs can always hope that if they are able to convince a judge that a statute is bad or unwise they may be able to induce him to declare it unconstitutional on this "catch-all" peg. The plausibility of any plaintiff's argument stems from the fact that most words, virtually all sentences, and surely all statutory and constitutional provisions — particularly those relating to an exercise of judgment or discretion by public officials or bodies — are to greater or lesser degree susceptible of differing interpretations and hence "vague and ambiguous." Such lack of certainty unfortunately is as true of law as it is of life. Where would the law of tort be without its "reasonable man" and "ordinary care," the law of contract be without "consideration," or criminal law be without "malice" and "sanity." Nor should it be overlooked that the constitutional provisions upon which Plaintiffs rely in the instant case are the Fourteenth Amendment's "equal protection" and "due process" clauses. Quite obviously, if the mere presence of vagueness, uncertainty and ambiguity were to be fatal to the validity of legal concepts, we would have no law. If it were to be fatal to the validity of statutory enactments, we similarly would have no statutes and perhaps the Federal Constitution too would have to be declared too vague to stand.

Fortunately, however, such is not the case. The fact that a statute may require interpretation, that it may be

difficult to interpret, or that it is susceptible of different interpretations, does not render it *unconstitutionally* vague. The universal and indeed quite *necessary* rule is that if a statute is susceptible of any sensible construction at all, it is the duty of the courts to fill in such gaps as may exist and supply such interpretation and construction as may be required to save the law, with due regard being given to its purpose and the intent of the legislature. See, e.g. 82 C.J.S. *Statutes* § 68(c), pp. 118-19. As stated by this Court in *Screws v. United States*, 325 U.S. 91, 100 (1945):

"Yet if the Act falls by reason of vagueness so far as due process of law is concerned, there would seem to be a similar lack of specificity when the privileges and immunities clause \* \* \* and the equal protection clause \* \* \* of the Fourteenth Amendment are involved. *Only if no construction can save the Act from this claim of unconstitutionality are we willing to reach that result.*" (Italics added.)

We find it hard to believe that Plaintiffs can seriously maintain that the words "intelligent and upright" (it is these words respecting juror qualifications upon which their constitutional attack on Ga. Code Ann. § 59-106 is primarily based) render the statute facially unconstitutional *because of vagueness*. Both of the words which Plaintiffs dislike are of common usage in the English language and both are contained in all standard dictionaries. Webster defines "intelligent" as having the power of reflection or reason and "upright" as morally correct, honest and just. *Webster's Third New International Dictionary* (3d Ed. 1961), pp. 1175, 2518. With respect to legal proceedings the terms are sim-

ilarly defined in Words and Phrases as the ability of a juror to understand and properly dispose of a case on trial<sup>4</sup> and soundness of moral principle and character.<sup>5</sup> Certainly the jury commissioners of Taliaferro County understood the words in these terms when they reconstituted the jury list pursuant to the trial court's direction. The chairman testified that an "upright" citizen was one who enjoyed a good reputation in the community, with information from the Sheriff as to whether an individual had a criminal record being considered in this matter [A. 284-288]. The chairman further testified that the test of "intelligence" was whether the individual would be capable of understanding the proceedings in the court room and performing the duty of a juror [A. 283-285]. Even more recently the Supreme Court of Georgia, in rejecting the same "vagueness" attack which Plaintiffs make here, said essentially the same thing in other words when it declared that under Ga. Code Ann. § 59-106:

"An intelligent person is one possessed of ordinary information and reasoning facility." *Sullivan v. State*, \_\_\_\_\_ Ga. \_\_\_\_\_ (No. 25147, decided May 8, 1969).

Surely the phrase "intelligent and upright," as employed in Ga. Code Ann. § 59-106, is as clear as the "suitable in character and intelligence" which this honorable Court indicated might possibly be a *minimum* qualification for jurors in *Brown v. Allen*, 344 U.S. 443, 474 (1943). Surely it is as clear as the concept of "general reputation in the community" which can influence a jury as to whether an accused shall be hanged or set

<sup>4</sup>21A Words & Phrases, *Intelligent*, p. 718-719.

<sup>5</sup>43 Words & Phrases, *Uprightness*, p. 447.

free (and where specifics to further explain or illustrate the term are expressly prohibited). See 22A C.J.S. *Criminal Law* § 676; 32 C.J.S. *Evidence* §§ 434, 436.<sup>6</sup> We think the terms are a lot clearer than the period of "during good behavior" during which Federal judges are permitted to hold their appointive offices. See U.S. Const. Art. III, Section I; 28 U.S.C. §§ 44, 134. In short, we think that Plaintiffs "vagueness" contentions are wholly devoid of merit and are illusory only. The terms "intelligent and upright" are sufficiently plain and simple so as to really obviate any necessity for judicial interpretation or construction at all, but, even were this not so, it is abundantly clear that the terms are easily capable of judicial interpretation and construction, and hence under *Screws* are not subject to serious attack on the ground of being unconstitutionally vague.

(b) *Capacity for wrongful administration.*

According to Plaintiffs, the vice of the alleged vagueness is that it renders the statute capable of being administered in a wrongfully discriminatory manner. Under this theory, it would seem to follow that an actual showing of unconstitutional administration of the statute must *ipso facto* cause the statute to be declared unconstitutional. We think the court below accurately placed its finger on the difficulty with this line of reasoning when it observed from the bench that Plaintiffs' argument, if valid, could be used to "knock out every statute" [A. 100-101]. Because Plaintiffs' "capacity" argument is so clearly applicable to any juror qualification requiring

<sup>6</sup>This is particularly significant when one considers that the required level of clarity and precision is generally said to be, as it ought to be, higher for criminal than for civil statutes. See, e.g., *Teague v. Keith*, 214 Ga. 853, 854, 108 S.E.2d 489 (1958); 82 C.J.S. *Statutes*, § 68, p. 109, fn. 33.

an exercise of judgment or discretion on the part of the board or officials charged with the responsibility of composing a jury list, we think we need not argue further that what Plaintiffs really are contending is that something in the Fourteenth Amendment precludes the existence of any juror qualifications or standards requiring an exercise of judgment. Noting that until now the courts appear to have experienced no great difficulty in distinguishing between facial validity and wrongful administration of statutes pertaining to jury selection, and in fashioning a proper remedy to cure the letter without disturbing the former, see e.g. *Labat v. Bennett*, 365 F.2d 698, 715 (5th Cir. 1966), we will therefore proceed to discuss the constitutionality of those juror qualifications which do require an exercise of judgment on the part of officials charged with the responsibility of juror selection, with particular emphasis upon those qualifications of intelligence and character which have become such an integral part of juror selection in both the Federal and State systems.

(c) *Constitutionality of intelligence and character qualifications.*

The reaction of the district court to Plaintiffs' attack upon juror qualifications of "intelligence" was that the Seventh Amendment is still in the Constitution and that a litigant was entitled to have a juror who was capable of understanding jury proceedings [A. 392]. Only last year this honorable Court held that trial by jury was so fundamental to the American Scheme of Justice as to cause the right, as guaranteed to Federal criminal defendants by the Sixth Amendment, to be similarly guaranteed to State criminal defendants by the "due

process" clause of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 148-150 (1968). We cannot conceive that the Court will declare jury trials to be "basic in our system of jurisprudence" and "fundamental to the American scheme of justice" in 1968 and then proceed to hold that jury service cannot be restricted to persons having the capacity and character to act as fair and impartial jurors in 1969. Certainly this has not been the view of the Court in the past. In *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880), it was observed in striking a statute which singled out and expressly denied colored citizens the right and privilege of serving as jurors:

"We do not say that within the limits from which it is not excluded by the amendment a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. *It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications.* We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose." (Italics added.)

In the same vein, this Court reiterated in *Brown v. Allen*, 344 U.S. 443, 473-474 (1953):

"States should decide for themselves the quality of their juries as best fits their situation so long as the classifications have relation to the efficiency of the jurors and are equally administered.

Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, *so long as the source reasonably reflects a cross-section of the population suitable in char-*

*acter and intelligence for that civil duty."* (Italics added.)

We think that the emphasized portion of the foregoing language could well be taken as indicating that such intelligence and character qualifications for jurors as are contained in Ga. Code Ann. § 59-106 may be affirmatively required by the Sixth and Seventh Amendments to the United States Constitution — notwithstanding the fact that such qualifications are subject to abuse because of the fact that somewhere along the line some individual or individuals must exercise judgment and render a decision. Surely this view would be more in harmony with the spirit and utility of the Sixth and Seventh Amendments than the view expressed by Plaintiffs that intelligence and character cannot be used as a juror qualification merely because these terms call for the exercise of judgement and thus afford an opportunity for racial discrimination. It is noteworthy that recent Federal legislation respecting jury selection also deems it to be essential that jurors be sufficiently intelligent so as to have the capacity to understand judicial proceedings. See, 82 Stat. 58 (28 U.S.C.A. § 1865). Indeed all of the things which Plaintiffs attack in Georgia's statute (i.e. vagueness and capacity for wrongful administration) are abundantly present in 28 U.S.C.A. § 1865. Not only does the Federal statute contain a requirement that a juror be able to read, write, and understand the English language "with a degree of proficiency sufficient to fill out *satisfactorily* the juror qualification form," but it expressly provides for exclusion of anyone who "is incapable, by reason of mental or physical infirmity, to render *satisfactory* jury service." Hence the Federal statute too calls for the exercise of judgment and a deci-

sion regarding its equally vague terms for measurement of intelligence and capacity to perform as a juror.

But whether or not intelligence and character requirements are constitutional mandates for jury service, it would at least seem clear that such minimal criteria are permitted to the States under the Fourteenth Amendment. See *Brown v. Allen*, 344 U.S. 443 (1953); *Strauder v. West Virginia*, 100 U.S. 303 (1880).<sup>7</sup> For this reason, we think that Plaintiffs' attack upon Georgia's jury selection statute, which if successful would equally strike the Federal as well as most, if not all, State jury selection statutes, is without merit.

**2. The operation in Taliaferro County of Georgia's statutes pertaining to the selection of members of county school boards of education is not violative of any right secured to Appellants by the Thirteenth, Fourteenth or Fifteenth Amendments.**

While Plaintiffs maintained below that the various Georgia statutes relating to the selection of county school board members were facially unconstitutional, they appear to have abandoned this position on appeal. It is now their contention only that such statutes, *as administered in Taliaferro County*, operate to dilute Negro participation in the holding of political office and consequentially in the management and administration of the county school system. See Appellants' Brief, pp. 38-48.

<sup>7</sup>See also, *Swain v. Alabama*, 380 U.S. 202 (1965), where the Court found no fault with an Alabama statute which in much broader language than is contained in Ga. Code Ann. § 59-106 placed on the jury rolls all male citizens in the community over 21 who:

"... are reputed to be honest, intelligent men and are esteemed for their integrity, good character and sound judgment."

Although the State's intervention was for the limited purpose of asserting the *facial validity* of its statutory enactments, since Plaintiffs now apparently are arguing that the operation of the law should be suspended in Taliaferro County, we think it may be appropriate to observe in passing that we find considerable difficulty in our attempt to understand just what Plaintiffs are asking of the Court respecting the holding of county political office — such as school board membership — in Taliaferro County. Plaintiffs stated below that they were not contending that the Constitution requires county school board members to be elected by the voters rather than appointed by the county grand jury [A. 158]. Nor do we understand Plaintiffs to contend that where the Negro population is ten, fifty or any other fixed percentage of the county's citizenry, the appointing authority must appoint any fixed percentage of Negroes to appointive county political offices. On the other hand, it does appear that the essence of Plaintiffs' discontent is the fact that formerly none and now only one of their race is a member of the Taliaferro County Board of Education. Arguing originally that their complete lack of representation on the school board wholly excluded Negroes from management and administration participation in county school affairs, Plaintiffs proceeded to argue after a Negro citizen had been appointed to the board, that although the appointee was a respected citizen of the Negro community as far as moral character was concerned [A. 375], he was not the right type of Negro insofar as they were concerned (they considered him an "Uncle Tom") [A. 376].

As already indicated Plaintiffs do not state what they expect of the district court. One would have thought

that they had secured relief through the court ordered recomposition of the grand jury list of Taliaferro County. One of the first acts of the newly created grand jury was to fill one of the two then existing vacancies on the school board by appointment of a Negro citizen of the county. The injunction issued by the court respecting future exclusion of Negroes from the county jury list would seem to show promise of continued and probably increased Negro representation on the board in the future. Plaintiffs' none the less indicate in their Brief that they believe that the district court should fashion some unspecified additional remedy which would apparently require that State law respecting selection of county school board members be held in abeyance in Taliaferro County for an unspecified period of time. Do Plaintiffs' suggest that present office holders be ordered out of their offices by the district court so that they can be replaced by Negroes? Must the court reserve a fixed number or any specified county political offices in the county be reserved for Negroes only? It is difficult to reply to unknown demands.

While Plaintiffs confine their argument solely to membership on the county board of education, we think it essential to point out that the county political office most intimately concerned with and possessing the greatest power over the day to day operation and administration of a county school system in Georgia is not that of membership on the school board. The most influential position is the office of county school superintendent and this is an elective office in Taliaferro County pursuant to Article VIII, Section VI, Paragraph I of the Consti-

tution of the State of Georgia of 1945 (Ga. Code Ann. § 2-6901).<sup>8</sup>

In *Snowden v. Hughes*, 321 U.S. 1 (1944), this Court pointed out that the right to hold a state political office was derived solely from the relationship of the citizen to his state, as established by state law. In view of the totality of the situation we respectfully submit that the relief already granted by the three-judge district court is adequate and that the operation in Taliaferro County of state law pertaining to the selection of county school boards members need not be suspended or otherwise altered by the district court.

**3. The Court should deny Appellants' request for an advisory opinion that a "freeholder" qualification for membership on a county school board is violative of the Fourteenth Amendment.**

Article VIII, Section V, Paragraph I of the Constitution of the State of Georgia of 1945 (Ga. Code Ann. § 2-6801), as well as Ga. Code Ann. § 32-902, provides that members of county boards of education shall be "freeholders."<sup>9</sup> Plaintiffs attack this provision under the equal protection clause of the Fourteenth Amendment on the ground that exclusion of non-freeholders from

<sup>8</sup>It may further be noted that the State constitutional provisions which provide generally for the election of county school superintendents and appointment of school board members by the county grand jury can be altered by local or special law conditioned upon approval by a majority of the qualified voters of the school district voting in a referendum thereon. See Article VIII, Section V, Paragraph II (Ga. Code Ann. § 2-6802) and Article VIII, Section VI, Paragraph II (Ga. Code Ann. § 2-6902) of the Constitution of the State of Georgia of 1945.

<sup>9</sup>*Black's Law Dictionary* (4th Ed. 1951), p. 793 defines a "freeholder" as one having title to realty. The term is similarly described in 28 Am.Jur.2d, *Estates* § 8 as any estate existing in, or arising from real property.

this county political office constitutes an arbitrary and unreasonable classification.

It is respectfully submitted that Plaintiffs attack wholly fails to present a "case or controversy" within the meaning of Article III, Section II of the United States Constitution. This Court has repeatedly said that litigants are not entitled to advisory opinions on disputes which are of a hypothetical or abstract nature. E.g. *Barr v. Matteo*, 355 U.S. 171, 172 (1957); *Eccles v. Peoples Bank of Lakewood Village, California*, 333 U.S. 426, 432 (1948); *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). In the present case, there is no evidence whatsoever to indicate that the "freeholder" requirement has been or is being used to exclude Plaintiffs or anyone else, whether black or white, from membership on a county school board either in Taliaferro County or anywhere else within the State of Georgia. Plaintiffs' concession that many of Taliaferro County's Negro citizens (including Plaintiff Calvin Turner) did in fact own real property [A. 97] would seem to negate even the "capacity" of this qualification for racially discriminatory use in the county. The question is indeed so completely hypothetical as to prevent Plaintiffs from rising to the higher but ordinarily still insufficient position of asserting constitutional rights on behalf of others who are deprived of the same. See, e.g. *Joint Anti-Fascist Refugee Committee v. McGrath, Attorney General*, 341 U.S. 123, 150-152 (1951) [concurring opinion].

The aura of unreality surrounding Plaintiffs' "freeholder" argument is also seen when one considers the fact that neither the constitutional provision nor the statute containing this qualification specifies any minimum quantity or value for the property the "freeholder"

must hold. Even if this qualification were to be shown to be anything more than a dead letter, it would still seem that an individual who was a serious aspirant for the office of county school board member would be able to obtain a conveyance of the single square inch of land he would require to become a "freeholder."

Finally, it may be noted that even if the "freeholder" issue had properly been raised by someone who had in fact been unable to obtain the necessary "square inch," and as a result had been denied public office, Plaintiffs' position would be contrary to law. So far as we have been able to determine the courts, in the absence of any provision to the contrary in the *State* constitution, have uniformly upheld property qualifications for political office. See e.g. *Becraft v. Strobel*, 287 N.Y.S. 22, 29 (1936), *aff'd* 274 N.Y. 577, 10 N.E.2d 560 (1937); *State v. McAllister*, 28 W.Va. 485, 18 S.E. 770, 773 (1893). In *Vought v. Wisconsin*, 217 U.S. 590 (1910), where a Wisconsin statute requiring jury commissioners to be "freeholders" was attacked as a denial of "due process" and "equal protection" by individuals indicted by grand jurors who had in turn been appointed by such freeholder jury commissioners, this Court thought the federal question to be so clearly without merit as to justify dismissal on jurisdictional grounds. Similarly in *Strauder v. West Virginia*, 100 U.S. 303, 310 (1880) this Court said in so many words that a State could constitutionally confine jury service to freeholders.

While the desirability and wisdom of "freeholder" requirements for State or county political office may indeed be open to question, we think that insofar as the

constitutionality of the same is concerned, 42 Am.Jur. *Public Officers* § 49 is entirely correct when it states:

"Undoubtedly a legislature has power to impose a property qualification upon office holders."

**CONCLUSION**

For the reasons stated herein the instant appeal should be dismissed for want of jurisdiction or in the alternative the judgment of the United States District Court for the Southern District of Georgia should be affirmed.

Respectfully submitted,

---

ARTHUR K. BOLTON  
Attorney General

---

HAROLD N. HILL, JR.  
Executive Assistant  
Attorney General

---

ALFRED L. EVANS, JR.  
Assistant Attorney General

---

J. LEE PERRY  
Assistant Attorney General

Please address  
all communications to:

ALFRED L. EVANS, JR.  
Assistant Attorney General  
132 State Judicial Bldg.  
40 Capitol Square  
Atlanta, Georgia 30334  
Telephone: 525-0401

*Attorneys for the State  
of Georgia.*

NORMA

9;